THE DECISION OF MOOT CASES BY COURTS OF LAW.

The recent case of *United States* v. *Evans*,[1] brought before the Supreme Court of the United States the question whether an appellate court will hear an appeal when their judgment cannot affect the decision of the court below, but will merely establish a rule for observance in cases subsequently arising.

The question is an interesting one, although not novel. There seem to be two classes of cases where the courts have been called upon for opinions not strictly judicial:

1. Advisory opinions for the benefit of the legislative or executive branches.

2. Appeals in criminal cases by the prosecution after a verdict of acquittal.

As to the first class, there is little to be said after the essay of Professor Thayer on this subject.[2] To quote from the note thereto:

"In this country the constitutions of seven States have provided for obtaining opinions from the judges of the highest court upon application by the executive or the legislature, viz., of Massachusetts, New Hampshire, Maine, Rhode Island, Florida, Colorado and South Dakota. In one other State, Missouri, a similar clause was introduced into the Constitution of 1865, just after the war; but it continued only ten years, and was left out of the Constitution of 1875. It dates in Massachusetts from 1780; in New Hampshire from 1784; in Maine (formerly a part of Massachusetts) from 1820; in Rhode Island from 1842; in Florida from 1868; in Colorado from 1886; in South Dakota from 1889."

In England, the practice of consulting the judges is of very ancient origin. Professor Thayer[3] cites an instance in 1387 where "King Richard II puts to his judges a long string of questions," but there seems no instance since 1760 in which the Crown has exercised this privilege.[4] However, the House of Lords has frequently called upon the judges for their opinion, perhaps the most famous case being that of Queen Caroline[5] and the most recent that of the Trial of Lord Russell.[6] That the Lords do not always

[1](1909) 213 U. S. 297.

[2]Thayer, Legal Essays, 42-59.

[3]I Cases on Constitutional Law, 175.

[4]Opinion of the Justices (1879) 126 Mass. 557, 562.

[5](1820) 2 Brod. & Bing. 284.

[6][1901] A. C. 446.

follow these opinions is shown by a considerable number of cases, for example, *O'Connell* v. *The Queen;*[7] and they have called for them when no case was under discussion.[8] The non-judicial quality of such opinions is distinctly asserted.[9] Any further discussion of this subject would be but a repetition of Professor Thayer (as are some of the above data).

It is safe to say, however, that there is a growing dislike of constitutional provisions requiring the judges to give their advisory opinions. Justice Savage of Maine not long ago refused to answer questions propounded by the legislature, and while the ground for his refusal was that the "solemn occasion" required by the Constitution, when the opinion of the judges could be asked, had not arisen, he showed his dislike of the provision in no uncertain terms.[10] Chief Justice Emery of the same State, in an able article, says:

"In both Massachusetts and Maine the justices have always given these required opinions with more or less reluctance and even with protests. In a few instances some able justices have refused to give the opinion, and in all cases where the opinion has been given, it has been only because the justices believed it to be their constitutional obligation, however inexpedient the requirement may have seemed to them." [11]

An advisory opinion, said Ames, *C. J.*, in *Taylor* v. *Place,*[12] "given, as it must be, without the aid which the court derives, in adversary cases, from able and experienced counsel, though it may afford much light, from the reasonings or research displayed in it, can have no weight as a precedent."

The Supreme Court of Minnesota has held that no opinion can be required of the court in the absence of any constitutional provision requiring the same.

"This does not come within the provisions of the Constitution, and, as the Constitution now stands, would be, in our opinion, not only inconsistent with judicial duties, but a dangerous precedent. The impropriety of an unauthorized expression of opinion by a Judge or Court, especially one of last resort, upon a matter which may subsequently come before the Court for adjudication, will immediately suggest itself."[13]

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[7](1844) 11 Cl. & Fin. 155.

[8]M'Naghten's Case (1843) 10 Cl. & Fin. 200.

[9]*Ex Parte* County Council of Kent [1891] 1 Q. B. 725.

[10](1908) 103 Me. 514.

[11]2 Maine Law Rev. 1.

[12](1856) 4 R. I. 324, 362.

[13]In the Matter of the Application of the Senate (1865) 10 Minn. 78, 81.

A class of advisory opinions of importance in New York deals with election cases. In a number of instances the Court of Appeals has decided questions of election law long after the particular election had taken place and when the decision would have no effect on actual rights. That the opinion is advisory is clearly stated—"The election having been held, the decision of the question is of no practical importance in the particular case. But the courts in the first and second departments have reached opposite conclusions upon the question, and a final decision seems to be required to prevent embarrassment in the future from conflicting judicial decisions."[14]

Apart from election cases, however, there appear to be no advisory opinions in New York, and perhaps such controversies, originating as truly litigated cases but afterwards becoming moot by reason merely of lapse of time, are hardly to be classed with the advisory opinions we have before considered. The New York cases are rather unusual in that the opinions have been given without statutory direction and seemingly with no fear of establishing a precedent that might be invoked in connection with other classes of cases.

In the Federal courts the question of advisory opinions arose very early after the formation of the present judicial system. By the act of March 23, 1792[15] Congress provided that the circuit courts of the several districts were to pass on certain claims for pensions, and to certify their opinions to the Secretary of War, who, if he had cause to suspect imposition or mistake, could withhold the name of the applicant from the pension list and make report of the same to Congress at its next session. Thereupon the judges of the circuit courts for the districts of New York, Pennsylvania and North Carolina declined to treat this as a judicial power to be exercised by them as a court, although those of New York agreed to perform the duty imposed by Congress in the character of commissioners and out of court.[16]

In consequence of their attitude, the provisions in question were repealed at the next session of Congress.[17] The repealing Act, however, saved all rights which might be founded upon "legal adjudications" under the Act of 1792, and a case came up to the

[14]Matter of Madden (1895) 148 N. Y. 136, 139. See also Matter of Fairchild (1897) 151 N. Y. 359; and Matter of Norton (1899) 158 N. Y. 130, 131.

[15]I U. S. Statutes at Large, 243.

[16]Hayburn's Case (1792) 2 Dall. 409. See U. S. *v.* Ferreira (1851) 13 How. 40, 49.

[17]Act of Feb. 28th, 1793; I U. S. Statutes at Large, 324.

Supreme Court which required it to pass on the validity of the decisions of those judges who had purported to act as commissioners as "legal adjudications." The Court held that the Act of 1792 was unconstitutional, because no judicial power, within the meaning of the Constitution, had been conferred on the circuit courts, and that the judges could neither act *qua* judges nor *qua* commissioners under that Act.[18]

A similar question arose under the Act of March 3, 1823,[19] which was passed to carry out the provisions of the treaty of 1819 with Spain. The judges of certain Federal courts in Florida were to receive and adjust treaty claims arising within their respective jurisdictions, and decisions in favor of the claimants were to be reported to the Secretary of the Treasury "who, on being satisfied that the same is (*sic*) just and equitable, within the provisions of the said treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged." On appeal to the Supreme Court from the award of one of these judges, the Court declined jurisdiction on the ground that there was no judicial question involved, and *Hayburn's Case* was cited and approved.[20] Again, in 1864, the Supreme Court declined to take jurisdiction of appeals from the Court of Claims, because Congress had provided, by the Act of March 3, 1863,[21] that an estimate by the Secretary of the Treasury was necessary before the judgments of the Court of Claims could be paid.

"Congress cannot extend the appellate power of the Court beyond the limits prescribed by the Constitution," said Taney, *C. J.*, in his last judicial utterance, "and can neither confer nor impose on it the authority or duty of hearing or determining an appeal from a Commissioner or Auditor, or to any other tribunal exercising only special powers under an act of Congress; nor can Congress authorize or require this Court to express an opinion on a case * * * where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect." [22]

Congress thereupon repealed these provisions of the Act of March 3, 1863, and the Supreme Court then began to take cognizance of

[18]U. S. *v.* Todd, not officially reported, but inserted as a note to U. S. *v.* Ferreira, *supra*, at p. 52.

[19]3 U. S. Statutes at Large, 768.

[20]U. S. *v.* Ferreira, *supra*.

[21]12 U. S. Statutes at Large, 765, secs. 7, 14.

[22]Gordon *v.* U. S. (1864) 2 Wall. 561; unofficial opinion, 117 U. S. 697, 702.

appeals from the Court of Claims without further question.[23] This ended the attempts to subject the judgments of Federal courts to examination or revision by executive officers.

There has been only one attempt by the Federal Executive to secure an advisory opinion. In 1793, President Washington requested the opinion of the judges of the Supreme Court upon the construction of the treaty of 1778 with France.

"Considering themselves as merely constituting a legal tribunal for the decision of controversies brought before them in legal form, these gentlemen deemed it improper to enter the field of politics by declaring their opinion on questions not growing out of the case before them." [24]

So much for *advisory opinions.*[25]

Perhaps the question of more interest to-day is that of appeals in criminal cases by the prosecution. The case of *U. S.* v. *Evans,* before mentioned, was of that nature. The facts were shortly these: By section 935 of the Code of the District of Columbia,[26] it is provided that

"In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal that is given to the defendant, including the right to a bill of exceptions: *Provided,* That if on such appeal it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside."

From a verdict of not guilty under an indictment for murder in the Supreme Court of the District of Columbia, a writ of error was taken to the Court of Appeals of the District, which dismissed the appeal for want of jurisdiction, and the case was then taken to the Supreme Court of the United States on writ of *certiorari.* The Court quashed the writ, on the ground that hearing and deciding such an appeal is not an exercise of judicial power, and the decisions in *Hayburn's Case* and *U. S.* v. *Ferreira* were cited and approved. This statute and the decision thereunder may profitably be compared with the statutes and decisions in other jurisdictions.

It is necessary, at the outset, to recognize the limits of the ques-

[23] U. S. *v.* Jones (1886) 119 U. S. 477.

[24] 5 Marshall, Life of Washington, Ch. 6, pp. 433, 441; 2 Story, Commentaries on the Constitution, sec. 1571.

[25] On this subject, see also, Opinion of the Justices (1879) 126 Mass. 557 (where the English doctrine is discussed); Dubuque, The Duty of Judges as Constitutional Advisors, 24 Amer. L. Rev. 369; 6 A. & E. Encyc. (2 ed.) 1065.

[26] 31 U. S. Statutes at Large, 1341.

tion involved and to note in how comparatively few cases can the question of moot decisions arise. In the first place, the great majority of courts never get beyond the question of "double jeopardy." If the statute is one of the character quoted above, the usual treatment is to hold it void as respects the right of the prosecution to appeal, on the ground that the allowance of such an appeal would subject the defendant to the double jeopardy or second trial usually inhibited in the State Constitution, and then, it would seem, to assume tacitly that the legislature did not intend that there should be a right of appeal if there could be no real defendant. Possibly this is a correct assumption, but not a necessary one—certainly it is not an assumption so clear as not to call for comment. *People* v. *Webb*[27] is typical. Here is a case where attorney-general, defendant and court cited numerous authorities, but all going to the question of double jeopardy. There is not a suggestion that perhaps the legislature intended the court to lay down a rule for future guidance.[28]

The Supreme Court of the United States is more open in the presumption which it makes against the legislature's intent to give the prosecution the right of appeal. In *U. S.* v. *Sanges*[29] the Court denied the right of the government to appeal or take writ of error from the district or circuit courts to the Supreme Court, under section 5 of the Judiciary Act of 1891.[30] That Act simply read: "That appeals or writs of error may be taken," etc., not prescribing whether one or both parties should have the privilege. "It is impossible," said Gray, *J.*, "to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States."

Statutes must be distinguished, also, which do not go far enough to put the defendant in double jeopardy—those, for example, allowing a writ of error on behalf of the prosecution where the indictment is quashed on motion, or where a demurrer thereto is sustained, or on motion in arrest of judgment.[31] Here, of course, no appeal is moot, because, on judgment reversed, there is no objection to a retrial on the merits.

Then in a few States the opportunity for a moot question to

[27](1869) 38 Cal. 467.

[28]See also State *v.* Reynolds (Tenn. 1817) 4 Hayw. 110

[29](1892) 144 U. S. 310, 323.

[30]26 U. S. Statutes at Large, 827.

[31]See, for example, D. C. *v.* Green (1907) 29 App. D. C. 296; State *v.* Burgdoerfer (1891) 107 Mo. 1; People *v.* Bork (1879) 78 N. Y. 346.

arise is similarly limited because of the absence of "double jeopardy" provisions, or because of the narrow construction given such provisions by the courts. In these States, therefore, there can be a new trial on the merits, even after a verdict of acquittal, and consequently an appeal by the prosecution raises a strictly judicial question. In Louisiana, although on an acquittal by the jury due to a misdirection of the judge the State cannot appeal, it may appeal from any ruling of the judge upon a matter with which the jury have nothing to do, as in a motion to quash before trial or a motion in arrest of judgment after conviction.[32]

Connecticut holds squarely to the doctrine that there can be a second trial after a verdict of "not guilty," the Supreme Court of Errors laying down the doctrine that

"putting in jeopardy means a jeopardy which is real and has continued through every stage of one prosecution, as fixed by existing laws relating to procedure; while such prosecution remains undetermined the one jeopardy has not been exhausted." [33]

In Arkansas, the phrase "jeopardy of life or limb" is construed very literally, and the Supreme Court has held that there may be a new trial after an acquittal on the merits in the case of misdemeanors punishable only by fine.[34]

In Alabama, the State by statute is allowed an appeal in all criminal cases when the Act of the legislature under which the indictment is found is held to be unconstitutional.[35] The Supreme Court has affirmed a judgment of acquittal under this statute,[36] but there seem to be no judgments of reversal and the questions of double jeopardy or moot decisions do not appear to have been raised.

In Pennsylvania, the Commonwealth can not except to erroneous decisions made at the trial which may cause the acquittal of the accused (except for nuisance, forcible entry and detainer), but for error in quashing an indictment, arresting judgment after verdict of guilty, and the like, the Commonwealth can bring error, in the absence of statutory restraint.[37]

But aside from these somewhat exceptional cases, what juris-

[32]State *v.* Robinson (1885) 37 La. Ann. 673, 675; U. S. *v.* Sanges (1892) 144 U. S. 310, 317.

[33]State *v.* Lee (1894) 65 Conn. 265, 273.

[34]State *v.* Graham (1839) 1 Ark. 428, 434; State *v.* Czarnikow (1859) 20 Ark. 160.

[35]III Codes of 1907, sec. 6246.

[36]State *v.* Agee (1887) 83 Ala. 110.

[37]Commonwealth *v.* Wallace (1886) 114 Pa. St. 405, 411.

dictions have statutes providing for appeals by the prosecution on moot questions in criminal cases? A cursory examination of the laws of the various States and territories shows only six jurisdictions that either clearly or by fair implication, give a right of appeal to the prosecution in such cases—Arkansas, District of Columbia, Indiana, Iowa, Mississippi and Nevada.

In Arkansas, the attorney-general may file an appeal when

"error has been committed to the prejudice of the state, and upon which it is important, to the correct and uniform administration of the criminal law, that the Supreme Court should decide." [38]

No case seems to have arisen under this section.

The statute of the District of Columbia[39] has already been commented upon.

In Indiana, the prosecuting attorney may except to any decision during the course of the trial and reserve the point for the Supreme Court, which may not reverse the judgment, but only pronounce an opinion upon the correctness of the decision of the trial court, which decision shall be "binding upon the inferior courts and shall be a uniform rule of decision therein." [40]

The Supreme Court of Indiana has not hesitated to pass on such questions.[41] The right of the State to appeal on a question of law is as old as the Revised Statutes of 1852.[42]

In Iowa,

"the supreme court cannot reverse or modify the judgment so as to increase the punishment, but may affirm it, and shall point out any error in the proceedings or the measure of punishment, and its decision shall be obligatory as law." [43]

The Supreme Court upholds the statute, and has decided moot cases in which the defendant did not appear at all.[44]

Mississippi allows the State or municipality to appeal from a judgment actually acquitting the defendant where a question of law has been decided adversely to the State or municipality for the express purpose of having the Supreme Court decide the question.[45] No case directly in point has been decided, but the court

[38]Kirby's Dig. (1904) secs. 2603, 2604.

[39]Code, sec. 935. See, *supra*, p. 671.

[40]I Burns' Ann. St. (1908) secs. 2162, 2212.

[41]State *v.* Hunt (1893) 137 Ind. 537; State *v.* VanValkenburg (1878) 60 Ind. 302.

[42]II Revised Statutes of 1852, 381.

[43]Code of 1897, sec. 5463.

[44]State *v.* Mackey (1891) 82 Ia. 394; State *v.* Ward (1888) 75 Ia. 637.

[45]Code of 1906, sec. 40 (2).

has declined to pass on a number of cases where the statute was in question, on the ground that they did not come within the terms of the statute, not evidencing any disposition to nullify the statute because a strictly judicial question might not be raised.[46]

The statute of Nevada in effect provides that the appeal taken by the State shall not stay or affect the operation of a judgment for the defendant on the merits.[47] There are no Nevada decisions on moot cases.

With these jurisdictions may be classed Ohio, where the statute reads as follows:

"The prosecuting attorney may except to any decision of the court, and present his bill of exceptions thereto, which the court shall sign, and the same shall be made a part of the record."

While there is nothing in the language of this Act indicating that moot cases were intended to be included under its terms, the courts have so construed it—a rather unusual attitude, for the presumption, according to most courts, is against, and not for, decisions on hypothetical cases.[48]

The Constitutions of Virginia[49] and of West Virginia[50] are absolute in their language in giving a right of appeal to the State in revenue cases. A writer in the *Virginia Law Register* thinks these provisions can only be sustained on the ground that such an appeal merely raises a moot question.[51] But the courts of neither State have taken this view.

In England, the question of moot criminal appeals could not hitherto arise, for prior to the Criminal Appeal Act of 1907 there were no criminal appeals. Section 1 of that Act gives the right of appeal both to the crown and to the defendant. No cases have yet been decided involving the settlement of moot points by the Court of Criminal Appeal, but that the dilemma either of passing on a mere moot case or else putting the defendant in double jeopardy may have to be confronted has been pointed out in a recent work.[52]

Actual cases of little importance are often appealed, for the

[46]State *v.* Willingham (1905) 86 Miss. 203; State *v.* McDowell (1894) 72 Miss. 138.

[47]Comp. Laws of 1900, secs. 4434, 4443.

[48]State *v.* Granville (1887) 45 Oh. St. 264; State *v.* Buechler (1897) 57 Oh. St. 95, 101.

[49]Sec. 8.

[50]Art. 8, sec. 3.

[51]6 Virginia Law Reg. 243.

[52]Sibley, Criminal Appeal and Evidence, 65-67.

value of the precedent, but these are not moot. A Rhode Island case distinguishes such cases:

"A moot case is one which seeks to determine an abstract question, which does not rest upon existing facts or rights. Where a concrete case of fact or right is shown, we know of no principle or policy of law which will deprive a party of a determination simply because his motive in the assertion of such right is to secure such determination." [53]

What, in general, are the advantages or disadvantages of moot appeals? There is surprisingly little reasoning on this question. The advantages are patent—the promulgation of a rule by the highest court for the guidance of the inferior courts on questions which may never or rarely go to the highest court in a strictly judicial way, but which are constantly arising in the inferior courts; uniformity in the administration of the criminal law by inferior courts; the placing of the State on something like an equality with the defendant; and the promptness with which an erroneous decision of an inferior court may be overthrown as a precedent. The disadvantage most emphasized is that the Court may later be called upon to pass on a concrete adversary case that they have already passed upon as a moot case.[54] In such a situation the Court would naturally be prejudiced in favor of the view already taken, and both judge and attorneys would labor under a disadvantage. Perhaps the disadvantages of such appeals were best stated by Chief Justice Shepard in *U. S.* v. *Evans:*

"The appellee in such a case, having been freed from further prosecution by the verdict in his favor, has no interest in the question that may be determined in the proceedings on appeal, and may not even appear. Nor can his appearance be enforced. Without opposing argument, which is so important to the attainment of a correct conclusion, the court is called upon to lay down rules that may be of vital interest to persons who may hereafter be brought to trial. All such persons are entitled to be heard on all questions affecting their rights, and it is a harsh rule that would bind them by decisions made in what are practically 'moot' cases, where opposing views have not been presented." [55]

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[53] Adams *v.* Union R. R. Co. (1899) 21 R. I. 134, 140.

[54] 2 Story, Commentaries on the Constitution, sec. 1571.

[55] (1907) 30 App. D. C. 58.